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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S  
COMPLIANCE WITH § 271 OF THE  
TELECOMMUNICATIONS ACT OF  
1996

DOCKET NO. T-00000A-97-0238

IN THE MATTER OF QWEST  
CORPORATION'S COMPLIANCE  
WITH SECTION 252(e) OF THE  
TELECOMMUNICATIONS ACT OF  
1996

DOCKET NO. RT-00000F-02-0271

ARIZONA CORPORATION  
COMMISSION

DOCKET NO. T-01051B-02-0871

Complainant.

v.

QWEST CORPORATION

Respondent.

TESTIMONY OF  
  
THOMAS C. PELTO  
  
ON BEHALF OF  
  
AT&T COMMUNICATIONS  
  
OF THE MOUNTAIN STATES, INC.

AUGUST 29, 2003

**I. OVERVIEW AND BACKGROUND**

**Q. PLEASE STATE YOUR NAME AND POSITION.**

A. My name is Thomas C. Peltó. I am testifying on behalf of AT&T Communications of the Mountain States, Inc. and TCG Phoenix. I serve as AT&T's Law and Government Affairs Vice President for the Western Region.

**Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.**

A. I received a Bachelor of Business Administration degree from the University of Michigan. In 1988, I received a Juris Doctor, with high honors, from the University of Texas Law School.

**Q. PLEASE STATE YOUR RESPONSIBILITIES AT AT&T.**

A. I am responsible for the development and implementation of policy with regard to AT&T's activities in the 14-state Qwest region and 5 SBC states. I have held this position since 1997. Previously, I worked as AT&T's Chief Regulatory Counsel for the Southwest Region.

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

A. My testimony addresses the Settlement Agreement entered into and filed jointly by the Staff of the Arizona Corporation Commission ("Staff") and Qwest Corporation ("Qwest"). I identify the serious flaws inherent in the Agreement

1 and explain why the Commission should reject the Agreement. I also respond to  
2 the direct testimonies filed by Qwest and Staff in support of the Settlement  
3 Agreement.

4 **Q. BRIEFLY SUMMARIZE YOUR TESTIMONY.**

5 A. It is my recommendation that the proposed Settlement Agreement be rejected.  
6 The Settlement Agreement is intended to resolve 2 proceedings and a sub-docket  
7 in another proceeding.<sup>1</sup> Instead, the cases should be resolved on the merits, based  
8 on the existing record in those matters.

9 In each of these proceedings – the Section 252(e) proceeding, the Show Cause  
10 proceeding and the Section 271 sub-docket – Staff found that Qwest had acted  
11 inappropriately or unlawfully and, in some cases, did so willfully. Staff's  
12 findings and conclusions demonstrate that Qwest's actions caused harm to  
13 competition and CLECs. After reviewing the Settlement Agreement it is readily  
14 apparent that the Agreement is not structured in a manner that will remedy the  
15 harm to competition and the CLECs.

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<sup>1</sup> Docket No. RT-00000F-02-0271 is a docket initiated by the Commission to review Qwest's compliance within Section 252(e) of the Telecommunications Act of 1996 ("Act"). The docket was initiated by the Commission at the request of Staff after Staff became aware of agreements that Qwest had with certain competitive local exchange carriers ("CLECs") that had not been filed with the Commission for approval pursuant to Section 252(e) of the Act. Docket No. T-01051B-02-0871 was initiated by the Commission at the request of Staff after Staff became aware in October 2002 that Qwest had not implemented the Commission's June 12, 2002, order in the Wholesale Cost Case (Decision No. 64922). Staff also determined that Qwest's processes for implementing wholesale rate changes were unreasonable and discriminatory. Docket No. T-00000A-97-0238 was initiated by the Commission to evaluate Qwest's Compliance with Section 271 of the Act. My understanding is the Settlement Agreement only resolves the 271 sub-docket, which was intended to resolve the question whether terms contained in certain agreements between Qwest and CLECs that prohibited certain CLECs from participating in the Section 271 docket may have interfered with the Section 271 regulatory process.

1 CLECs were not invited to participate in the settlement discussions from the  
2 onset. By the time a few of the CLECs were allowed to comment, Qwest's and  
3 Staff's positions had already hardened through the negotiation process, which  
4 prevented any flexibility to incorporate suggestions made by the CLECs.  
5 Therefore, it is not surprising that not a single CLEC is a party to the agreement.  
6 Essentially, the Settlement Agreement is flawed because it fails to focus on  
7 adequately addressing the harm to competition and the CLECs. The Commission  
8 should reject the Settlement Agreement and address and resolve each of the  
9 proceedings based on the evidence and fashion a remedy designed to remedy  
10 Qwest's discriminatory conduct.

11 This was a crime on competition perpetrated by the use of secret agreements with  
12 select competitors. The Settlement Agreements is the product of -- ironically --  
13 secret negotiations between Staff and Qwest. Consequently, it bears little relation  
14 to the harm caused and does even less to remedy the underlying discrimination.

15 Finally, however, I would stress that AT&T's criticisms are limited to the  
16 settlement process and the Settlement Agreement and are not related to the fine  
17 work Staff did in each of the proceedings.

18 **II. SETTLEMENT AGREEMENT**

19 **Q. WHAT DOCUMENTS DID YOU REVIEW IN ADDITION TO THE**  
20 **SETTLEMENT AGREEMENT?**

21 **A.** I reviewed the following documents:

1. Memorandum dated November 26, 2002, from the Utilities Division to the Commission regarding Qwest Corporation – Failure to Implement Wholesale Rate Changes Ordered in Decision No. 64922 (Docket No. T-01051B-02-0871)
2. Direct Testimony of Matthew J. Rowell dated April 17, 2003, on behalf of Staff in Docket No. T-01051B-02-0871 (“Rowell Direct”).
3. Staff’s Closing Brief dated July 15, 2003, in Docket No. T-01051B-02-0871.
4. Direct Testimony of Marta Kalleberg dated February 21, 2003, in Docket No. RT-00000F-02-0271 (“Kalleberg Direct”).
5. Staff’s Initial Post-Hearing Brief dated May 1, 2003, in Docket No. RT-00000F-02-0271.
6. Staff’s Reply Brief dated May 15, 2003, in Docket No. RT-00000F-02-0271.
7. Section 271 Sub-Docket – Staff Report and Recommendation dated May 6, 2003, in Docket No. T-00000A-97-0238 (“Staff Report”).
8. AT&T’s Response to Settlement Agreement Filed Jointly by Qwest and Staff July 25, 2003 (“AT&T’s Response”).

I also reviewed portions of other documents referred to in my testimony.

**Q. YOUR LIST IS GENERALLY LIMITED TO STAFF FILINGS. IS THERE A REASON FOR THIS?**

A. Yes. Time did not allow me to review the entire record of all 3 cases. The record is simply too voluminous. I evaluated the reasonableness of the Settlement Agreement by comparing the terms of the Settlement Agreement to Staff’s findings and conclusions contained in Staff’s original recommendations, testimony and briefs. These documents are based on Staff’s independent review of the evidence. Therefore, they should provide an objective measuring stick for

1 determining whether the Settlement Agreement is fair, reasonable, in the public  
2 interest and supported by the evidence.

3 **Q. PLEASE IDENTIFY THE SIGNATORIES TO THE SETTLEMENT**  
4 **AGREEMENT.**

5 A. Qwest and Staff.

6 **Q. WHY IS THAT SIGNIFICANT?**

7 A. The principles embodied in the Agreement reflect the negotiations of only these  
8 two parties. Since the CLECs were essentially excluded from these negotiations,  
9 the Settlement Agreement does not, and cannot, adequately reflect the positions,  
10 priorities and principles the CLECs necessarily would want to see. This  
11 difference in priorities can be readily seen in the section on voluntary  
12 contributions contained in the Settlement Agreement. This provision provides no  
13 benefit to CLECs. I cannot imagine any CLEC proposing such a provision. On  
14 the other hand, the discount credits, which are of greater importance to CLECs,  
15 are provided on only a subset of the services Eschelon and McLeod received the  
16 discounts on and prospective discounts were eliminated entirely. Had the CLECs  
17 been involved or been given a meaningful opportunity to provide input, the  
18 Settlement Agreement would have reflected different priorities and allocations of  
19 the monetary values. Considering the nature of the cases and the underlying  
20 Qwest conduct, I do not believe it is appropriate at this stage to terminate the  
21 cases on the terms nor in the manner proposed by Qwest and Staff.

1 **Q. PLEASE IDENTIFY THE TERMS OF THE SETTLEMENT**  
2 **AGREEMENT THAT YOU BELIEVE THE COMMISSION TO PAY**  
3 **PARTICULAR ATTENTION TO?**

4 A. The terms that I believe the Commission needs to seriously review are: 1) Cash  
5 Payments; 2) Voluntary Contributions; 3) Discount Credits; 4) Access Line  
6 Credits; 5) UNE-P Credits; 6) Additional Voluntary Contributions; 7) Opt-in for  
7 Eligible CLECs; 8) Wholesale Rate Implementation; 9) Dismissal of Litigation;  
8 and 10) Compromise. The Commission also should review the Release of All  
9 Claims. The release was not filed by Qwest and Staff but it is an integral part of  
10 the Settlement Agreement.

11 **A. CASH PAYMENTS**

12 **Q. PLEASE DESCRIBE THE CASH PAYMENT TERMS.**

13 A. Paragraph 1 identifies the level of penalties or fines payable by Qwest to the State  
14 of Arizona, although the Agreement is careful to avoid the use of these words,  
15 instead preferring the phrase "Cash Payment." The total amount is \$5,197,000.  
16 This is comprised of \$5,000,000 for the Section 252(e) proceeding and the  
17 Section 271 sub-docket, an additional \$47,000 for the Section 252(e) proceeding,  
18 and \$150,000 for the Show Cause proceeding.

19 **Q. WHAT CONCERNS, IF ANY, DO YOU HAVE WITH THE "CASH**  
20 **PAYMENT" TERMS?**

21 A. The payments are simply inadequate to amount to a serious penalty. Staff  
22 testified that the Commission can levy maximum penalties of \$44,500,000 for the

1 Section 252(e) case, \$7,415,000 for the Section 271 Sub-docket, and \$1,260,000  
2 for the Show Cause case, a sum of \$53,125,000. The Settlement Agreement  
3 represents less than 10% of the maximum penalties Staff identified and 75% less  
4 than what Staff initially recommended. Given the serious violations, and the  
5 effort by Qwest to essentially cheat its way into long distance, this amount is  
6 simply insufficient.

7 **Q. DO YOU BELIEVE HIGHER PENALTIES ARE WARRANTED?**

8 A. Yes, and so did Staff up until a few months ago. Staff recommended penalties of  
9 \$15,047,000 in the Section 252(e) case, \$7,415,000 in the Section 271 Sub-docket  
10 and \$189,000 in the Show Cause proceeding, for total penalties in the amount of  
11 \$22,651,000.

12 **Q. WHAT DID THE EVIDENCE SHOW?**

13 A. As I stated earlier, I limited my review to Staff's testimony. But among other  
14 things, Staff's made the following findings:

15 **1. Section 252(e) Proceeding**

16 In the Section 252(e) proceeding, Staff concluded that:

17 (a) Qwest failed to comply with the following statutes and regulations: 47

18 U.S.C. § 252(e), Ariz. Adm. Code R14-2-1112, R14-2-1307, R14-2-1308, R14-2-  
19 1506 and R14-2-1508 (Kalleberg Direct at 2);



1 (b) "The decision to enter into a unique and discriminatory relationship with  
2 Eschelon was an intentional and willful decision by Qwest" (*Id.* at 23);

3 (c) "The relationship between McLeod, U S WEST and later, Qwest, was  
4 unique and discriminated against other CLECs who could not view and possibly  
5 opt-in to the agreements between the parties since they were not publicly filed"  
6 (*Id.* at 35);

7 (d) "The decision to enter into a unique and discriminatory relationship with  
8 McLeod was an intentional and willful decision by Qwest" (*Id.* at 39);

9 (e) "Staff has determined that with regard to the Eschelon and McLeod  
10 agreements and non-participation clauses contained in unfiled agreements,  
11 Qwest's actions were intentional, willful, and contrary to Commission rule and  
12 processes" (*Id.* at 76);

13 (f) "The signal must be sent that Qwest's actions are highly egregious and  
14 unacceptable and the negative impact of these actions must be remedied" (*Id.*).

15 **2. Section 271 Sub-Docket**

16 In the Section 271 sub-docket Staff found and concluded that:

17 (a) "Information gathered by Staff shows that Qwest attempted to silence two  
18 of its largest wholesale competitors, among others, during critical timeframes of  
19 the Commission proceedings" (Section 271 sub-docket – Staff Report and  
20 Recommendation (May 6, 2003) at 2);

1 (b) "Qwest used the [Eschelon] agreement on several occasions to keep  
2 Eschelon from appearing in Section 271 workshops and Change Management  
3 Process ('CMP') proceedings where it would have brought issues to the  
4 Commission's attention which would have entered into the Commission's  
5 ultimate determination as to whether Qwest met certain Section 271 checklist  
6 requirements" (*Id.*);

7 (c) "The evidence shows that Qwest intentionally prevented the carriers from  
8 raising issues that would have reflected adversely on Qwest's compliance with  
9 Section 271 requirements. These actions by Qwest could have disadvantaged  
10 competitors, and interfered with the integrity of the Commission's processes." *Id.*  
11 at 3.

12 **3. Show Cause Proceeding**

13 In the Show Cause proceeding, the Staff concluded that:

14 (a) "six months is clearly an excessive and unreasonable amount of time for  
15 the implementation of the wholesale rates ordered by Decision No. 64922"  
16 (Rowell Direct at 8);

17 (b) "the five-month average indicates that Qwest's wholesale rate change  
18 system as a whole is unreasonably slow and inefficient" (*Id.*, at 9);

19 (c) "Implementing the wholesale rates for states that had pending 271  
20 applications ahead of the Arizona rates would have been the result of a conscious  
21 decision on the part of Qwest's management" (*Id.*, at 11);

1 (d) "in spite of the Commission's order to implement the Arizona rates  
2 immediately, Qwest diverted resources to the implementation of rates for the nine  
3 states listed in Table 2" (*Id.*, at 15).

4 These statements justify Staff's initial recommendation and provide absolutely no  
5 basis to reduce Staff's initial recommendation by 75%. As noted by Staff, "[t]he  
6 signal must be sent that Qwest's actions are highly egregious and unacceptable...  
7 (Kalleberg Direct at 76.). \$5,197,000 is essentially a slap on the wrist for Qwest  
8 and will not alter the incentives that caused Qwest to make what amounted to a  
9 business decision to break the law, and commit what amounted to a \$10 billion  
10 fraud on competition and state commissions.<sup>2</sup>

11 **B. VOLUNTARY CONTRIBUTIONS**

12 **Q. BRIEFLY DESCRIBE THE VOLUNTARY CONTRIBUTION SECTION**  
13 **OF THE AGREEMENT.**

14 **A.** Qwest has agreed to spend a minimum of \$6,000,000 on "voluntary  
15 contributions." Voluntary contributions is comprised of:

- 16 1. Section 501(c)(3) organizations or other State-funded programs involved  
17 in the areas of education and/or economic development;
- 18 2. Educational programs designed to promote greater understanding of  
19 telecommunications issue by Arizona consumers; and
- 20 3. infrastructure investment, including investments in unserved and  
21 underserved areas in Arizona.

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<sup>2</sup> Qwest previously estimated the in-region long distance market at \$10 billion, and recently reaffirmed that valuation.

1 The section goes on to outline how the money will be allocated and spent.

2 **Q. WHAT CONCERNS DO YOU HAVE WITH THE SECTION ON**  
3 **VOLUTARY CONTRIBUTIONS?**

4 A. Simply put, this section creates a \$6 million slush fund and converts what should  
5 be penalties into a public relations vehicle for Qwest. Indeed, there is nothing in  
6 this section that provides any assurance that Qwest wasn't going to spend the \$6  
7 million in exactly the same fashion, with or without the settlement. To the extent  
8 any of this amount is incremental, it still has no proper place in a settlement of  
9 any of the dockets and bears no logical connection to any of the underlying  
10 violations.

11 Section 501(c)(3) organizations are commonly known as charities. This means  
12 Qwest can give a charitable contribution, take credit publicly and more than likely  
13 take a tax deduction. Charitable contributions cannot be confused with penalties,  
14 especially since there is no mechanism that prevents Qwest from getting credit for  
15 charitable contributions that it would have made in any event, in the ordinary  
16 course of business. If Qwest believes certain charities should receive a Company  
17 contribution Qwest should do so on the merits, not as a part of a settlement for  
18 flagrantly unlawful behavior.

19 The education programs are not defined and could conceivably encompass  
20 Qwest marketing or quasi-marketing in the guise of education. For example,  
21 there is no parameters around branding of the so-called "education" programs.  
22 Moreover, there is again no logical connection to the underlying offenses.

1 Qwest also gets credit for making infrastructure investments. Several examples of  
2 infrastructure investment are provided. Underserved and unserved areas are  
3 permissible investment categories under the terms of the Agreement but have  
4 absolutely no connection with the proceedings. Furthermore, any investment  
5 Qwest does make in these areas will be ultimately owned and operated by Qwest  
6 and permit the Company to offer revenue producing services to customers who  
7 will have no idea Qwest agreed to make the investment because it got caught  
8 willfully breaking the law. The Commission should address the issues and merits  
9 of serving the underserved and unserved areas in a separate unrelated proceeding.

10 The Agreement allows for investment in route diversity for homeland security and  
11 911 services. The State of Arizona already has a 911 Fund from which Qwest  
12 recovers all its investment. If a 911 expenditure is necessary, the Fund should  
13 reimburse Qwest for it. All corporations, including AT&T, are spending huge  
14 sums for homeland security as a cost of doing business. There is no reason to  
15 give Qwest credit for these expenditures.

16 The Agreement allows for investment in advanced services. This provision is  
17 extremely galling for CLECs. The Federal Communications Commission has  
18 ruled that CLECs will not have access to Qwest's investment in broadband  
19 services on a resale or wholesale basis.<sup>3</sup> Thus, Qwest is permitted to invest in

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<sup>3</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications

1 facilities that CLECs will be precluded from using as a remedy for discrimination  
2 against CLECs. That is completely counterintuitive.

3 Likely for some of those same reasons, Staff's witness had previously rejected  
4 broadband deployment as a remedy: "The focus of this docket is on competition,  
5 rather than on infrastructure." Kelleberg Direct at 95. Staff's reasoning is equally  
6 applicable to all the infrastructure investment contained in the Agreement.

7 In sum, the whole section on "voluntary contributions" inappropriately reduces  
8 penalties payable to the State, improperly inflates the monetary value of the  
9 settlement, benefits Qwest, disadvantages CLECs, and reduces the amount  
10 available to remedy the harm to competition and the CLECs. Moreover, there is  
11 no assurance that any of these amounts are incremental and it is certain that some  
12 of the expenditures would have occurred anyway. Thus, the "voluntary  
13 contributions" provisions should be rejected in their entirety by the Commission.

14 **C. DISCOUNT CREDITS**

15 **Q. BRIEFLY DESCRIBE THE DISCOUNT CREDIT TERMS.**

16 A. Qwest agrees to give all CLECs, except Eschelon and McLeod, a one-time credit  
17 off of future purchases equal to 10% of the total of Section 251(b) and (c) services  
18 purchased by the CLECs between January 1, 2001, through June 30, 2002. To

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*Capability*, CC Docket No. 98-147; Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003), ¶¶ 272-297.

1 obtain the Discount Credit, the CLEC will have to release all claims against  
2 Qwest arising out of the issues raised in the three proceedings.

3 **Q. WHAT CONCERNS, IF ANY, DO YOU HAVE WITH THE DISCOUNT**  
4 **CREDIT TERMS"**

5 **A.** Fundamentally, competitive restitution should be the center piece of any  
6 settlement or order resolving these dockets. Qwest granted unlawful discounts to  
7 handpicked competitors for its own benefit, in part to buy their silence and  
8 suppress damaging information in the Section 271 proceeding. That  
9 discrimination must be remedied, but the Settlement Agreement falls far short.

10 First, the 10% discount credit in the Settlement Agreement is limited to  
11 Section 251(b) and (c) services. As Staff pointed out, both Eschelon and McLeod  
12 received a 10% discount on *all the carriers' purchases* from Qwest, not simply  
13 Section 251(b) and (c) services. Staff's Initial Post-Hearing Brief at 16-17. In  
14 Staff's initial testimony filed in the Section 252(e) case, Staff recommended that  
15 CLECs (other than McLeod and Eschelon) receive a *cash* payment totaling 10%  
16 of their Section 251(b) and (c) *and intrastate services* for the period January 1,  
17 2001, through June 30, 200, in addition to a prospective discount of 10% on all  
18 future purchases for a period of 18 months from the date of the order. Kalleberg  
19 Direct at 90-91.

20 In Qwest's response to AT&T's Fifth Set of Data Requests, Qwest estimated that  
21 payment to eligible CLECs for Section 251(b) and (c) services to be between \$6

1 and \$8 Million. If intrastate services are included, the amount of payments to  
2 eligible CLECs would be between \$12 and \$14 Million.<sup>4</sup> By omitting the  
3 intrastate services, the value of the discounts to CLECs is thus reduced by \$6  
4 million – coincidentally – the exact amount of the voluntary contributions.

5 By providing Eschelon and McLeod 10% discounts on tariffed intrastate services,  
6 Qwest gave Eschelon and McLeod a preference that was not available to other  
7 CLECs. This is discrimination. *A.R.S. § 40-334(A)* prohibits illegal preferences  
8 and discrimination. By including intrastate services within the scope of the  
9 discount credits, Staff could have remedied this State law violation. The apparent  
10 decision to trade away the credit for these services, undoubtedly at Qwest's  
11 insistence, leaves state law violations unremedied, to the benefit of Qwest and at  
12 the expense of the CLECs.

13 Second, a 10% discount should apply *prospectively* on future purchases made by  
14 CLECs as originally recommended by Staff. Eschelon and McLeod were able to  
15 discuss and make their plans knowing they would receive a 10% discount on all  
16 services going forward. Other CLECs should have the same opportunity. Staff  
17 initially agreed: "It can be argued that these CLECs may have wanted to enter the  
18 Arizona market for local service during that time period, but were unable to do so  
19 due to high prices for wholesale services." Kalleberg Direct at 92.

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<sup>4</sup> The \$12 to 14 Million value attached by Qwest to the retroactive credits also provides a basis for estimating the value to CLECs of prospective credits on the same services for the same period of time.



1 By making the discount prospective, CLECs can act and plan on the availability  
2 of the discounts and have the same forward-looking opportunity as Eschelon and  
3 McLeod had. CLECs must purchase services from Qwest to provide competitive  
4 services to customers. Although a one-time payment to the CLECs will benefit  
5 the CLECs, a prospective discount will benefit the CLECs, Arizona consumers  
6 and competition in general. It would encourage new competition on a prospective  
7 basis. Staff's witness also acknowledged the benefit of prospective payments:  
8 "By giving all carriers a 10 percent discount credit on a going forward basis for  
9 18 months, CLECs who have not entered the Arizona market may now do so and  
10 increased local competition may result." Kalleberg at 92.

11 **D. ACCESS LINE CREDITS AND UNE-P CREDITS**

12 **Q. DESCRIBE THE ACCESS LINE CREDIT TERMS.**

13 A. The Settlement Agreement provides for access line credits and UNE-P credits.  
14 These two credits are based on provisions contained in Eschelon's agreements.  
15 Eschelon received an access line credit of \$2 per month for each UNE-P line or  
16 unbundled loop purchased by Eschelon. The purpose was to compensate  
17 Eschelon for Qwest's intraLATA toll traffic terminating to customers served by  
18 Eschelon's switch. Joint Ex.1, No. 5 at 2. The UNE-P credit was a \$13 per  
19 month per UNE-P line credit, later raised to \$16 per month, to compensate  
20 Eschelon for its inability to bill interexchange carriers for all switched access  
21 because the records provided by Qwest to Eschelon were inadequate. Joint Ex. 1,

1 Nos. 4 and 5. The Settlement Agreement provides for maximum credits of  
2 \$660,000 and \$550,000, for the access line credits and UNE-P credits,  
3 respectively.

4 For the same reasons discussed in the section on discount credits, these two  
5 credits should also be prospective. To the extent the credits are prospective, no  
6 documentation would be required. The CLECs would simply receive the credits  
7 on a per-line basis unless and until Qwest can prove that the problem is  
8 completely fixed.

9 AT&T believes the facts behind these credits highlight the seriousness of Qwest's  
10 conduct and confirm Staff's initial findings and conclusions. Qwest paid the  
11 UNE-P credits because Eschelon was not receiving records from Qwest that  
12 documented all the calls being made by Eschelon's customers. The provision of  
13 call detail was and continues to be a Section 271 requirement.

14 The contracts with Eschelon go back to November 15, 2000. On December 21,  
15 2001, Cap Gemini Telecom Media & Networks U.S., Inc. ("CGE&Y") issued its  
16 Final Report of the Qwest OSS Test, Version 1.0. According to CGE&Y, there  
17 was no problem with the adequacy of Qwest's DUF records. However, in early  
18 2002 it was brought to the attention of CGE&Y that Qwest's provision of Daily  
19 Usage Files ("DUF") was suspect. CGE&Y did additional testing in January  
20 2002. Qwest initially flunked the test. *See* Incident Work Order 2129; Final

1 Report of Qwest OSS Test, Version 3.0 (May 3, 2002), §2.4.5. It took corrective  
2 action and multiple retests for Qwest to pass.

3 If Eschelon's agreements had been filed, evidence of inadequate DUF records  
4 would have surfaced in late 2000. For over two years Qwest's inability to provide  
5 adequate DUF records went unquestioned even though the issue remained  
6 unremedied.

7 The problem with Qwest's DUF records, the fact the Eschelon was silenced from  
8 bringing the issue to the attention of the Commission, and the fact that the CLECs  
9 were unaware of the incomplete DUF records during the period requires that the  
10 remedy be prospective on a per-line basis to the extent the problem has not been  
11 fixed. This goes to the core of the cover up and Qwest's intentional suppression  
12 of this information also warrants imposing penalties far greater than those  
13 contained in the Settlement Agreement. Qwest deliberately violated the law in an  
14 attempt to accelerate its long distance reentry. Its scheme succeeded in every  
15 state except Minnesota and Arizona. The Commission must ruin the business  
16 case for breaking the law.

17 **E. ADDITIONAL VOLUNTARY CONTRIBUTIONS**

18 **Q. BRIEFLY DESCRIBE THE SECTION ON ADDITIONAL VOLUNTARY**  
19 **CONTRIBUTIONS.**

20 **A.** As I mentioned previously, the paragraphs on discount credits, access line credits  
21 and UNE-P credits have minimums and maximums associated with the credits.

1 To the extent Qwest does not make payments equal to the minimums, it must  
2 allocate an amount equal to the difference between the amounts paid and the  
3 minimums to the section on "voluntary contributions". Therefore, to the extent  
4 that the Settlement Agreement represents payments to the CLECs, the  
5 Commission must recognize there is no certainty the CLECs will actually receive  
6 the amounts reflected in the Settlement Agreement and indeed creates the  
7 incentive for Qwest to minimize competitive restitution payments so that it can  
8 satisfy more of the obligations with funny money voluntary contributions.<sup>5</sup>

9 Every dollar that does not go to the CLECs indirectly goes back to Qwest by way  
10 of this section, reduces the value of the settlement and increases the size of the  
11 fund available to fund investments unrelated to the CLEC harm. If the discounts  
12 are prospective, every dollar will be received by the CLECs.<sup>6</sup>

13 **F. OPT-IN FOR ELIGIBLE CLECS**

14 **Q. BRIEFLY DESCRIBE THE SECTION ON OPT-IN FOR ELIGIBLE**  
15 **CLECS.**

16 **A.** The opt-in section allows eligible CLECs to opt-in to the non-monetary provision  
17 of the agreements listed on Table 1 of Staff witness Kalleberg's testimony.

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<sup>5</sup> There is also some question about the values contained in the Settlement Agreement. The Settlement Agreement allocates \$8,100,000 to \$8,900,000 to the Discount Credits. However, in response to AT&T's Fifth Set of Data Requests, Qwest states that between \$6 and \$8 Million will be paid out under Discount Credits. Therefore, the minimum value of the Agreement is inflated by \$2 Million and the maximum by \$900,000. But more importantly, there is a higher likelihood based on the numbers in the data request that the minimum allocation will not be met, allowing Qwest to allocate more to voluntary contributions.

<sup>6</sup> If the DUF problem has been fixed, any amount under the minimum should be paid, pro rata, as an additional discount credit to CLECs, rather than as additional voluntary contributions.

1    **Q.    WHAT, IF ANY, CONCERNS DO YOU HAVE WITH THIS SECTION?**

2    A.    The section contains the following condition: "In exercising such opt-in, however,  
3           the CLEC must satisfy the criteria under Section 252(i), including but not limited  
4           to, assuming any and all related terms in the agreement it chooses." Although the  
5           language attempts to track the Act and FCC qualifications, this language makes  
6           the section useless to CLECs. Furthermore, disputes must be resolved by the  
7           Commission, which imposes additional cost and delay on the CLECs.

8    **Q.    WHY DO YOU SAY THE CONDITIONS TO COMPLY WITH SECTION**  
9           **252(i) AND ASSUME RELATED TERMS IS THE AGREEMENT**  
10          **RENDER THE SECTION USELESS?**

11   A.    The "related terms" condition renders opt-in useless because the agreements were  
12          structured in a manner to prevent the other CLECs from being able to opt-in.  
13          Eschelon's representative testified in a deposition that Qwest wanted a "unique  
14          arrangement" so other carriers could not opt-in. AT&T' Section 252(e) Initial  
15          Brief at 12-13. Because of this, the Commission should not impose "related"  
16          terms on the CLECs. If Qwest wants to challenge the applicability of a particular  
17          provision to a particular CLEC then the burden should be on it to object and  
18          obtain relief from the Commission. The burden should not be on CLECs.

1       **G. WHOLESALE RATE IMPLEMENTATION**

2       **Q.     BRIEFLY DESCRIBE THE WHOLESALE RATE IMPLEMENTATION**  
3       **SECTION**

4       A.     The wholesale rate implementation section states that Qwest shall implement  
5             wholesale rate changes within 60 calendar days from the effective date of a final  
6             Commission decision approving rates and identifying the specific rates to be  
7             implemented.

8       **Q.     DO YOU HAVE ANY CONCERNS WITH THIS SECTION?**

9       A.     Yes. The time period for wholesale rate changes should be 30 calendar days as  
10            initially recommended by Staff. This would create parity between retail and  
11            wholesale rate changes.

12           At the end of the Show Cause case, Staff recommended that Qwest have 30 days  
13           to implement wholesale rate changes. Staff Closing Brief at 10. Staff now  
14           provides no explanation why 30 days is no longer sufficient. If Qwest is unable to  
15           make the necessary changes in 60 days in a particular case, Qwest should have the  
16           opportunity to prove that and get a waiver, but there has been no evidence  
17           presented that justifies 60 days in all cases or any disparity between retail and  
18           wholesale implementation.

**H. DISMISSAL OF LITIGATION**

**Q. BRIEFLY DESCRIBE THE DISMISSAL OF LITIGATION SECTION**

A. Basically, this section provides that the Section 252(e) proceeding, the Section 271 sub-docket and the Show Cause proceeding shall be terminated if the Settlement Agreement is approved. The Settlement Agreement "shall constitute full and final resolution of the Litigation, and the Decision shall include an order terminating and closing" the 2 cases and the Section 271 sub-docket.

**Q. WHAT CONCERNS DO YOU HAVE WITH THIS SECTION?**

A. None of the other parties to these cases, other than Staff and Qwest, signed on to the Settlement Agreement. Yet Qwest and Staff have agreed to terms that will extinguish all the CLECs' and other parties' claims and issues. This is extraordinary. Generally, if all parties do not sign on a settlement, the remaining parties can continue to litigate their claims. Not only were the CLECs denied the opportunity to participate in negotiating on the substantive terms of the settlement, the final agreement precludes them from raising their issues if they disagree with what Staff has negotiated. If the Settlement Agreement is approved, then non-settling parties should remain free to litigate their claims even if the underlying dockets are closed.

1       **I. COMPROMISE**

2       **Q.     BRIEFLY DESCRIBE THE SECTION ON COMPROMISE.**

3       A.     This section contains two concepts: the parties wish to settle the case "in a manner  
4               consistent with the public interest and based upon pre-filed testimony and  
5               evidentiary record developed in the Litigation []".

6       **Q.     WHAT, IF ANY, CONCERN DO YOU HAVE WITH THE SECTION?**

7       A.     The provision is internally inconsistent. On the one hand, the agreement says it is  
8               consistent with public interest and based on the evidence. On the other hand, it  
9               says none of the provisions may be cited or relied on as precedent. Essentially,  
10              Staff and Qwest are claiming the Agreement is legally supportable but do not  
11              want to be held to the terms publicly. Staff and Qwest are trying to have it both  
12              ways. As I have testified, the Settlement Agreement is not supported by the  
13              evidence, bears little relation to Qwest's illegal actions and should be rejected in  
14              favor of an Order that more closely reflects Staff's previously filed positions.

15       **J. RELEASE OF ALL CLAIMS**

16       **Q.     YOU INDICATE YOU REVIEWED THE RELEASE OF ALL CLAIMS**  
17       **REFERRED TO IN THE SETTLEMENT AGREEMENT, CORRECT?**

18       A.     Yes, although it was not attached to the Joint Filing, AT&T received a copy from  
19               Qwest, and its attorney indicated to AT&T the copy AT&T had was the final  
20               release.



1 Q. DO YOU HAVE ANY CONCERNS WITH THE RELEASE OF ALL  
2 CLAIMS?

3 A. The terms of the Release state that the party executing the Release releases any  
4 and all claims of whatever nature, including violation of State and federal statutes,  
5 tariffs, rules or regulations. As I testified earlier, McLeod and Eschelon received  
6 discounts on all services, Section 251(b) and (c) services, intrastate tariff services  
7 and interstate tariff services. However, the discount credits section of the  
8 Agreement only provides a discount on Section 251(b) and (c) services. CLECs  
9 must waive their intrastate tariff and interstate tariff preference and discrimination  
10 claims to obtain even the limited discounts offered on the Section 251(b) and (c)  
11 services. Although Qwest has argued the Commission has no jurisdiction over  
12 the 10% discount provided to McLeod and Eschelon on the interstate services, it  
13 has no qualms of using the Commission's authority to obtain an order to release  
14 those very same claims. I don't fault Qwest for trying, but the Commission  
15 should not approve such an overbroad release.

16 Q. HAVE YOU REVIEWED STAFF'S ORIGINAL RECOMMENDATIONS  
17 IN THE CASES?

18 A. Yes.

1    **Q.    CAN YOU SUMMARIZE STAFF'S ORIGINAL RECOMMENDATION?**

2    A.    Yes. I will limit my summary to the monetary provisions.<sup>7</sup> Staff proposed the  
3    following remedies:

4            1. Penalties totaling \$22,651,000. Kalleberg Direct at 95; Rowell Direct at  
5            14 & 16; Staff Sub-docket Section 271 Report, ¶6.

6            2. Cash payment eligible to CLECs totaling 10% of purchases of  
7            Section 251(b) and (c) and intrastate services for the period January 1,  
8            2001 through June 30, 2002. Kalleberg Direct at 90.

9            3. 10% Cash Discount on all Section 251(b) and (c) services and intrastate  
10           services prospectively for 18 months from date of order. *Id* at 91.

11           Three significant compromises are plainly apparent when this is compared with  
12           the terms of the Settlement Agreement. First, Staff agreed to eliminate the  
13           discount on all intrastate services and confine it only to Section 251(b) and (c).  
14           By Qwest's estimate this eliminates \$6 Million from the discount credits that  
15           would have been available to the CLEC's under Staff's initial recommendation.  
16           Second, Staff agreed to eliminate all prospective discounts, even on section  
17           251(b) and (c) services. Third, Staff agreed to reduce the penalties by  
18           \$17.5 Million. Instead, Staff agreed to accept and credit Qwest for \$6 Million in

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<sup>7</sup> Of course, since Staff's initial recommendation did not contemplate a settlement, many of the concerns raised here were not addressed by Staff at that time.

1 voluntary contributions. Thus, in exchange for \$6 Million in "voluntary  
2 contributions", the State of Arizona was shorted \$17 Million, the CLECs' credits  
3 were reduced by \$6 Million and prospective discounts to CLECs that could  
4 reasonably be valued at \$12 to \$14 Million were also eliminated.<sup>8</sup>

5 Qwest, on the other hand, will pay a substantially reduced penalty, significantly  
6 reduced credits to CLECs, no prospective discounts and it has also converted at  
7 least \$6 Million of that amount to soft money in the form of "voluntary  
8 contributions".<sup>9</sup>

9 **III. STAFF'S DIRECT TESTIMONY**

10 **Q. HAVE YOU READ STAFF'S DIRECT TESTIMONIES?**

11 **A.** Yes.

12 **Q. DO YOU HAVE ANY COMMENTS REARDING STAFF'S**  
13 **NEGOTIATION GOALS EXPRESSED BY MR.JOHNSON?**

14 **A.** Yes. Mr. Johnson states that "[i]t was Staff's goal that the conduct at issue in the  
15 Litigation not be repeated and that a reasonably sufficient deterrent be  
16 established." Johnson Direct at 6. What is missing from Staff's goals and Mr.  
17 Johnson's entire testimony is any mention of remedying the harm to the CLECs

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<sup>8</sup> This valuation is based on the valuation attached by Qwest to the credits for all intrastate services for an 18 month retroactive period of time. Obviously, the value of the prospective discounts could be greater or less.

<sup>9</sup> As I discussed, under the Settlement Agreement the voluntary contributions portion could actually exceed \$6 Million.

1 and competition. I acknowledge that Mr. Johnson testifies that Sections 3, 4 and  
2 5 are designed to benefit competitors, but there is no explicit acknowledgement  
3 by Mr. Johnson of the harm to competition and CLECs nor correlatively, that the  
4 need to remedy that harm are primary goals of the Settlement Agreement. By  
5 contrast, Staff witness Kalleberg had earlier made it quite clear that "[t]he focus  
6 of this docket is on competition, rather than on infrastructure." Kalleberg Direct  
7 at 95. The Staff witness did not at that time address the concept of "voluntary  
8 contributions," but charitable contributions and educational programs miss the  
9 mark just as badly as infrastructure investments. Qwest tried a similar approach  
10 in Minnesota, where it was unanimously rejected.

11 **Q. MR. JOHNSON STATES THAT AN AGREED UPON SOLUTION**  
12 **WOULD APPEAR BENEFICIAL BECAUSE LITIGATION HAS RISKS.**  
13 **DO YOU AGREE WITH MR. JOHNSON?**

14 **A.** Certainly litigation has risks. I would agree that in litigation "the outcome is  
15 ultimately determined by someone else." Johnson Direct at 3. And I would also  
16 agree that there are times that the parties to the litigation may prefer to have  
17 certainty instead of uncertainty. But certainty does not mean abandoning  
18 positions or obtaining certainty at the expense of other parties and without regard  
19 to the basis of the underlying claims or action.

20 I also see little uncertainty regarding Staff's case. The evidence supports Staff's  
21 initial recommendations and the mere fact that Qwest is unwilling to pay a  
22 meaningful penalty or reasonable competition restitution is patently insufficient.

1 In short, I see nothing which warrants Staff retreating so substantially from those  
2 recommendations.

3 As for someone else deciding the outcome of the litigation, that is how the  
4 process works. It is the Staff's responsibility to review and recommend solutions,  
5 the administrative law judge's job is to write a recommended decision and the  
6 Commission role is to evaluate that recommended decision. If the Commission  
7 approves the Agreement, the case is over. None of the wrongdoing of Qwest will  
8 be reflected in a final order. There will be no findings or conclusions regarding  
9 Qwest's improper and unlawful behavior. There will only be an order approving  
10 the settlement.<sup>10</sup>

11 **Q. DO YOU BELIEVE THE COMMISSION SHOULD MAKE FINDING AND**  
12 **CONCLUSIONS REGARDING QWEST'S BEHAVIOR?**

13 **A.** Absolutely. The recitals in the Agreement do not replace findings and  
14 conclusions that document Qwest' past behavior. Without findings and  
15 conclusions, Qwest will undoubtedly argue that its past actions were simply  
16 allegations and that there was no admission of wrongdoing. While no company  
17 wants findings and conclusions that it violated Commission rules, that its conduct  
18 was willful and intentional, that management made conscious decisions to make  
19 rate changes in other states before it made then in Arizona or that it discriminated

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<sup>10</sup> In Minnesota, the Commission first adopted the ALJ's recommended decision on liability, with findings and conclusions, and then conducted a separate penalty phase.

1       against CLECs, such findings have been made in other states and are appropriate  
2       in this case. Simply stated, the evidence should not be buried by the settlement.

3       I am not suggesting that Staff can never settle a case. But in this case, for all the  
4       reasons recited above, it would be better to reject the Settlement Agreement as  
5       proposed and resolve the cases on the merits based on the evidentiary record. At  
6       the very least, the Administrative Law Judge and Commission should review the  
7       record of all three cases before they make their decision whether to accept or  
8       reject the Settlement Agreement, not simply the testimony regarding the  
9       Agreement.

10                               **IV.   QWEST DIRECT TESTIMONY**

11   **Q.   QWEST WITNESS ZIEGLER ARGUES QWEST "WILL HAVE**  
12   **COMPROMISED SUBSTANTIAL RIGHTS AND DEFENSES" IT HAS**  
13   **ASSERTED IN THE SECTION 252(e) PROCEEDING BY GIVING THE**  
14   **CLECS THE DISCOUNT CREDITS. DO YOU AGREE?**

15   **A.   No. Mr. Ziegler's argument is based on Qwest's belief that a CLEC must take all**  
16       related obligations if it wanted to opt-in to Eschelon or McLeod's agreements.  
17       Ziegler Direct at 12.

18       First, as Eschelon testified, Qwest was manipulating the contract process so  
19       CLECs could not opt-in. Therefore, the contracts should be strictly construed in  
20       CLECs' favor and against Qwest for opt-in purposes. Second, both Eschelon and  
21       McLeod received 10% discount on widely disparate obligations. Eschelon was

1           only required to buy \$15,000,000 of Qwest's services. Joint Exhibit 1, No. 5, § 2.  
2           Except for Eschelon's obligation to provide consulting services, all the other  
3           obligations in the Agreement are Qwest's. McLeod was required to buy  
4           substantially more services than Eschelon. The Commission could find, as  
5           Minnesota did, that these provisions were a sham and that the 10% discount was  
6           unrelated to the obligation to buy a minimum amount of services or the consulting  
7           services. Or the Commission could find that the 10% discount was paid to silence  
8           its critics and keep damaging information out of state 271 proceedings. Both  
9           findings are supported by the evidence and either finding would allow a CLEC to  
10          opt-in to the agreement and obtain the discount quite easily. In no case should  
11          Qwest be able to hide behind the artifice it created to prevent other CLECs from  
12          obtaining the discounts.

13   **Q.   MR. ZIEGLER STATES THAT CLECS HAVE NO OPT-IN RIGHTS TO**  
14   **NON-SECTION 251 SERVICES. DO YOU AGREE WITH MR.**  
15   **ZIEGLER?**

16   **A.   No. Mr. Ziegler ignores the Commission's authority to remedy discrimination.**  
17          Qwest was providing the 10% discount of all services to McLeod and Eschelon,  
18          including interstate. Excluding interstate services by itself reduces Qwest's  
19          exposure substantially and while the remedy cannot therefore be made perfectly

1 precise in terms of remedying the totality of the discrimination, that is not a  
2 reason to narrowly construe opt-in rights to Qwest's benefit.<sup>11</sup>

3 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION?**

4 A. The Commission should reject the Settlement Agreement and instruct the  
5 Administrative Law Judge to draft recommended decisions in these dockets based  
6 on the existing record. In other words, permit the cases to be decided on the  
7 merits without reference to the Settlement Agreement. Alternatively, the  
8 Commission should address the inadequacies in the Settlement Agreement raised  
9 by the CLECs and provide Qwest and Staff the option to amend the Agreement to  
10 address the Commission's concerns and resubmit it for approval. In either event,  
11 the Commission should also make explicit findings regarding Qwest's past  
12 behavior. Under no circumstances should "voluntary contributions" take the  
13 place of or be permitted as offsets to the monetary penalties or competitive  
14 restitution.

15 The Commission should be concerned that not a single CLEC would sign the  
16 Settlement Agreement. The penalty is insufficient to change Qwest's behavior  
17 and the competitive restitution provisions fall far short of remedying Qwest  
18 discriminatory actions. Furthermore, the additional non-monetary terms are  
19 unacceptable, unnecessary and utterly unconnected to the underlying offenses.

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<sup>11</sup> Likewise, the discounts to McLeod and Eschelon also applied to all intrastate services in several other states.



1 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

2 A. Yes.

# **CERTIFICATE OF SERVICE**

(Docket No. T-00000A-97-0238, RT-00000F-02-0271, T-01051B-02-0871)

I certify that the original and thirteen copies of the Testimony of Thomas C. Pelto on behalf of AT&T Communications of the Mountain States, Inc. and TCG Phoenix were sent by overnight delivery on August 28, 2003 to:

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